

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Parts 21 and 74)
of the Commission's Rules With)
Regard to Filing Procedures in the)
Multipoint Distribution Service)
and in the Instructional)
Television Fixed Service)

MM Docket No. 94-131

and)

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Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)
(The BTA Decision))

PP Docket No. 93-253 /

In the Matter of Amendment of)
Parts 21, 43, 74, 78 and 94)
of the Commission's Rules)
Governing Use of the Frequencies)
in the 2.1 and 2.5 GHz Bands)
Affecting: Private Operational)
Fixed Microwave Service,)
Multipoint Distribution Service,)
Multichannel Multipoint)
Distribution Service,)
Instructional Television Fixed)
Service, and Cable Television)
Relay Service)
(The PSA Decision))

Gen. Docket No. 90-54

Gen. Docket No. 80-113

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Schwartz, Woods & Miller, on behalf of its ITFS clients, requests reconsideration of the Commission's decisions establishing competitive bidding for the auction of MMDS spectrum in geographic Basic Trading Areas (BTAs) and expanding MMDS Protected Service Areas (PSAs). The Joint Parties strenuously oppose the Commission's decision to accord BTA auction winners a right of first refusal vis a vis executory ITFS excess capacity leasing arrangements. This provision substantially impairs the contractual relationships of private parties and interferes with the freedom of ITFS entities to contract with parties of their choosing in violation of Article I, §10 of the United States Constitution. Moreover, this unconstitutional restriction will result in a devaluation of ITFS channel rights to the benefit of commercial BTA holders. Further, the right of first refusal contradicts the Commission's prior policies designed to protect ITFS licensees, including unfettered rights of assignment and rights to choose their prospective wireless cable partners.

Similarly, the Commission's decision to apply stricter standards to ITFS extension applications works to the detriment of ITFS interests and is in derogation of prior policies which have explicitly recognized the inherent obstacles to development of ITFS service to the public. The delays in developing ITFS service often are due to factors beyond ITFS parties' control, and the Commission has not cited any public interest justification for abandoning its current policy respecting extensions.

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(The PSA Decision))	

To: The Commission

PETITION FOR RECONSIDERATION

The law firm of Schwartz, Woods & Miller respectfully requests reconsideration, to the extent described below, regarding the above-referenced Commission decisions on behalf of the following Instructional Television Fixed Service (ITFS) clients:

Arizona State University
Board of Trustees of Community Technical Colleges
Boston Catholic Television Center

California State University-Fullerton
Catholic Diocese of Youngstown
Connecticut Public Broadcasting, Inc.
Daytona Beach Community College
Detroit Educational Television Foundation
Fifteen Telecommunications, Inc.
Mid-South Public Communications Foundation
Mississippi Authority for Educational Television
Mississippi EdNet Institute, Inc.
Monterey County Office of Education
New Jersey Public Broadcasting Authority
North Carolina Agricultural and Technical State University
North Carolina State University
Northern California Educational Television Association
Oregon Public Broadcasting
San Jose State University
Santa Clara County Office of Education
University of North Carolina at Charlotte
University of North Carolina Center for Public Television
University of North Carolina General Administration
WHYY, Inc.
Winston-Salem State University
WJCT, Inc.

(hereinafter "Joint Parties"). See also Attachment A. In support thereof, the following is shown:

1. The Joint Parties are ITFS applicants, permittees and licensees of ITFS facilities throughout the nation. They include community-based groups, local educational institutions, sectarian organizations and statewide governmental and educational entities. Some of them have operated ITFS systems for many years. They are aware that excess capacity leasing arrangements can facilitate development of new and enhanced ITFS service to the public. They also understand that, as the Commission has recognized, the ITFS service has taken decades to develop, in many cases due to inadequate funding for these facilities. As such they are vitally concerned that the Commission adopt rules and policies respecting the processing of MMDS applications which

fully protect the value of ITFS spectrum for noncommercial educational purposes and recognize the very practical obstacles to the development of ITFS service.

INTRODUCTION

2. In its decision in Docket Nos. MM Docket No. 94-131 and PP Docket No. 93-253, released June 30, 1995, the Commission has established competitive bidding procedures for the auction of MMDS spectrum in geographic blocks called "Basic Trading Areas" ("BTAs"). In its decision in Gen. Docket Nos. 90-54 and 80-113, released June 21, 1995, the Commission has approved expansion of the MMDS protected service areas ("PSAs"). The Joint Parties take no position on the Commission's use of the competitive bidding process to allocate available MMDS spectrum in its BTA proceeding or on its approval of the expansion of the MMDS service area in its PSA proceeding. Their concern, as ITFS applicants and licensees, is the effect that certain changes adopted in the BTA and the PSA proceedings will have on their rights and ability to provide adequate service to their instructional and educational users.

3. In its BTA decision, the Commission has granted a BTA auction winner a right of first refusal before an ITFS licensee or applicant can enter into an excess capacity leasing agreement with another entity in the BTA. As stated in paragraph 41 of its decision in the BTA proceeding,

ITFS station licensees and prospective ITFS applicants that seek to construct and operate new ITFS facilities located within a BTA and that choose to lease excess channel capacity will be free to negotiate with any

potential lessee, including the holder of the BTA. In furtherance of our goal of accumulating a full complement of channels, however, the holder of the BTA will be afforded the right to match the final offer of any proposed lessee. Should the holder of the BTA decline to exercise such right, then the ITFS applicant can enter into a lease arrangement with any operator it so chooses. This is not intended to interfere with present contractual rights that are in effect or renewal of those rights.

This language constitutes a right of first refusal for the BTA holder, and any executory ITFS lease agreement will be subject to this right of first refusal. ITFS applicants and licensees who do not have excess capacity agreements in place at the time of the MMDS competitive bidding process will be forced to enter into a contractual arrangement with a BTA holder exercising its first-refusal right.

4. In its PSA decision, the Commission imposes a more rigorous standard with respect to the granting of extensions of time to ITFS applicants for the completion of construction of ITFS facilities. In paragraph 17 of that decision, the Commission states in pertinent part that there will be "fewer grants of construction extension applications for both ITFS and MDS stations by stricter application of the previously-adopted standards."

5. The Joint Parties submit that both the right-of-first-refusal provisions in the BTA decision and the ITFS extension-of-time provisions in the PSA decision are extremely detrimental to the interest of ITFS applicants and licensee. They urge the Commission upon reconsideration to delete both of these provisions.

I. THE COMMISSION'S PROVISION GRANTING BTA HOLDERS A RIGHT OF FIRST REFUSAL ON ALL AGREEMENTS BY ITFS LICENSEES TO LEASE EXCESS CAPACITY TO MMDS OPERATORS IS UNCONSTITUTIONAL, IS DETRIMENTAL TO ITFS LICENSEES, AND CONTRADICTS THE COMMISSION'S PRIOR POLICIES DESIGNED TO PROTECT THE RIGHTS OF ITFS LICENSEES.

A. *Granting BTA Holders a Right of First Refusal Violates the Constitutional Provision Prohibiting Government Interference with Contractual Relations between Private Parties and Fundamental Freedom to Contract Principles.*

6. The Commission's determination to give BTA holders a right of first refusal before ITFS licensees can agree to lease excess capacity to other wireless cable entities violates Article I, §10 of the Constitution, which forbids federal and state governments from interfering with contractual relations between private parties.

7. Article I, §10 of the Constitution states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." This provision protects agreements between private parties from state and federal governmental interference. See Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983). The provision applies to federal as well as state government interference by virtue of the Fifth Amendment's Due Process Clause. See Lynch v. United States, 292 U.S. 571 (1934). The Court in Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983), established a test to determine if a government regulation, such as the Commission's MMDS BTA holder "right of first refusal" provision, would survive a constitutional challenge. The Court held that if a regulation has

"operated as a substantial impairment of a contractual relationship," it is unconstitutional unless the government can show that the regulation has a "significant and legitimate public purpose" and that the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose" asserted in support of the regulation.

8. The Joint Parties strongly believe that the right of first-refusal provision in favor of BTA holders would not survive this constitutionality test. First, the provision will "operate as a substantial impairment of a contractual relationship" regardless of the fact that, on its face, the provision does not appear to affect existing lease agreements or lease agreements entered into prior to the selection of BTA winners. The provision has implications even for existing arrangements. For example, if the wireless cable party to an agreement goes bankrupt, resulting in the termination of the agreement, any new agreement with another wireless cable operator would appear to be subject to the right of first refusal. Further, despite the Commission's indication that it "does not intend to interfere with present contractual rights," it is not at all clear whether the Commission would approve the assignment of rights pursuant to an excess capacity agreement to a new wireless cable operator without according the BTA winner a right of first refusal. Indeed, in the current regulatory climate, in which the Commission is moving where feasible to auction off spectrum and limit

incumbents' rights generally vis a vis BTA holders, it seems quite possible that the substitution of a new lessee could be viewed as an event triggering a BTA holder's right of first refusal.

9. Second, it would be difficult to show that the provision has a "significant and legitimate public purpose" or is "of a character appropriate to the public purpose" because the provision is fundamentally detrimental to ITFS licensees which provide instructional and educational services. It limits the rights of ITFS licensees to obtain the best facilities and provide the best services they can through effective negotiation using the bargaining power inherent in their ITFS authorizations. The right-of-first-refusal provision takes the essence of such ITFS licensee bargaining power away. ITFS licensees can no longer guarantee that an agreement will be signed upon completion of negotiations because the BTA holder has the right to take over the proposed arrangement. The right-of-first-refusal provision will undermine ITFS licensees' ability to negotiate for the best facilities in order to provide the best educational services possible; therefore, the provision is contrary to the public interest.

10. The right-of-first-refusal provision is also contrary to the fundamental principle that allows individuals the freedom to enter into contractual relations with whomever they choose. The provision forces an ITFS licensee to contract with a BTA winner regardless of whether such an arrangement is desirable or

satisfactory from the ITFS licensee's viewpoint. The fact that a BTA operator may be willing to match the literal terms of an agreement in no way guarantees that the BTA operator would be as financially or managerially sound and therefore as likely to perform its obligations as the competing wireless cable operator. And, too, there may be other reasons why an ITFS licensee would prefer a wireless cable partner other than the BTA holder. Because the provision may force an ITFS licensee to enter into an agreement with an undesirable or unsatisfactory party, it manifestly interferes with the licensee's freedom to contract.

B. Granting BTA Holders a Right of First Refusal Is Detrimental to the Interests of ITFS Licensees Because the Restriction On Their Freedom to Contract Will Likely Result In a Devaluation of Their Channel Rights.

11. There is no doubt that the right of first refusal will lead to the devaluation of ITFS channel rights. Wireless cable entities which were once interested in leasing excess capacity from ITFS licensees will be significantly less willing even to begin negotiations knowing that any proposed arrangement would be subject to preemption by the BTA holder. The resulting reduction in the number of potential wireless cable lessees will decrease competition for ITFS channel rights and, accordingly, lower their value. It should be stressed that it commonly takes months to hammer out excess capacity arrangements between wireless cable and ITFS parties. The Joint Parties submit that a wireless cable entity will be effectively discouraged from undertaking the time, effort and expense of negotiating a contract knowing that it is

subject to preemption by the BTA holder exercising its right of first refusal.

12. There would be other reasons as well for an ITFS licensee's inability or reluctance to contract with the BTA holder. For example, the statutory competitive bidding process of a state or local governmental ITFS licensee could be compromised by the forced right of first refusal in violation of Amendment X to the Constitution. In addition, local conflict-of-interest considerations, the desirability of working with a locally-owned group, the desire for a comprehensive statewide plan embracing multiple BTAs, or other factors might disfavor contracting with a BTA holder. Other non-contractual considerations, such as the basic comity between the parties (which, after all, would be entering into a long-term arrangement), or differing attitudes toward sensitive issues of programming decency, could favor selection of a wireless cable operator other than the BTA holder. Even if the wireless cable entity were to choose to negotiate, its valuation of the proposed lease would inevitably be lowered under these circumstances. In any event, these contractual and non-contractual considerations are of fundamental importance to the negotiating parties and should be respected by the Commission.

C. Granting BTA Holders a Right of First Refusal Contradicts the Commission's Prior Policies Designed to Protect the Rights of ITFS Licensees.

13. The right-of-first-refusal provision is contrary to the Commission's prior excess capacity agreement policies designed to

protect the rights of ITFS licensees, including unfettered rights of assignment. For example, in Harlem Consolidated School District #122, FCC 94-312 (rel. Dec. 20, 1994), the Commission held that an ITFS lease with a wireless cable company did not conform with Commission requirements because the lease included a provision stating that if the ITFS lessee terminated its activities, it would be required to assign its Commission authorizations and related applications to a designee of the wireless company. The Commission stated that "We believe that such an open-ended provision unduly intrudes in an area that has been the sole province of the licensee." The Commission took a similar stand in East Bernard Independent School District, FCC 93-288 (rel. June 10, 1993), in which it affirmed that "[t]he lease affords [the wireless cable company] the right to select a prospective assignee of the ITFS license, which impermissibly intrudes upon that which has traditionally been the right of a licensee." As the Commission knows from its own review and approval of excess capacity lease arrangements, it is quite common for such arrangements to include specific provisions guaranteeing the right of the ITFS lessor to review carefully the background and the principals of the proposed wireless cable lessee. Such provisions are premised upon the recognition by both parties to the arrangement that, because of the public character of the ITFS entity, it is essential that its ITFS channels be installed in a reliable and satisfactory manner as soon as reasonably possible. The ITFS lessor therefore has a

legitimate concern and interest in the identity of the wireless cable entity and its principals, as well as all subcontracting parties which may be associated with that entity. The Commission's grant of a right of first refusal to a BTA holder contradicts and subverts these fundamental principles employed by ITFS lessors in assessing their prospective ITFS lessees.

14. The Joint Parties submit that the Commission, in its zeal to pursue adoption of BTA policies relying upon auctions to guide development of wireless cable systems, has failed to heed the adverse consequences to ITFS interests of the right-of-first-refusal policy favoring BTA holders. Accordingly, the Joint Parties believe that the Commission action is contrary to the Commission's prior announced promise to protect ITFS spectrum from undue derogation while promoting wireless cable development. For example, in its proceedings in Gen. Docket No. 90-54, 6 FCC Rcd 6792, 6792-6793 (1991), which permitted wireless cable entities, inter alia, to use certain available ITFS channels, the Commission emphasized that it remained "committed to not jeopardize the current or future ability of ITFS to fulfill its primary intended purpose of providing educational material for instructional use." One of the Commission's main objectives has always been to protect long-term ITFS growth, and it has "rejected proposals that would substantially benefit wireless cable because of their potentially negative impact on ITFS."

15. The right-of-first-refusal provision is a Commission retreat from this prior commitment to preserve the rights of ITFS

licensees. The provision directly contradicts the Commission's policy that has prohibited restrictions on actions that "unduly intrude in an area that has been the sole province of the licensee." See Harlem Consolidated, supra. ITFS licensees were once free to choose from available wireless cable entities when negotiating an excess capacity lease agreement. Now, with the granting of a right of first refusal to BTA holders, the Commission is in effect choosing the ITFS licensee's wireless cable operator. This explicit and wholly unjustified intrusion on the rights of ITFS licensees should be rejected by the Commission.

II. THE COMMISSION'S DECISION TO BE MORE STRICT IN GRANTING ITFS APPLICANTS EXTENSIONS OF TIME ON CONSTRUCTION PERMITS IS DETRIMENTAL TO THE INTERESTS OF ITFS APPLICANTS

16. In its PSA decision, the Commission extended the MMDS protected service area from 15 to 35 miles. In justification of that determination, the Commission commented that stricter application of previously-adopted standards in its treatment of extension requests would deter speculators and restrain "economic blackmail" of authorized or previously proposed stations occasioned by the filing of proposals at the periphery of a service area. However, the Commission has indicated that this stricter policy would apply indiscriminately to ITFS stations as well as MMDS stations. Irrespective of the legitimacy of policy considerations which might properly relate to perceived abuses in the context of extension requests by MMDS stations, the Joint Parties submit that the Commission has not advanced any significant

public interest reason why such a stricter policy should apply to extension requests by ITFS stations.

17. In its proceedings in 1984 regarding the allocation of certain ITFS channels to the MMDS service and establishing procedures regarding ITFS excess capacity lease agreements, 94 FCC 2d 1203, 1224-25 (1984), the Commission reaffirmed that it would "continue to recognize . . . that the nature of educational institutions is such that it will generally take them much longer than it would take a commercial entity to begin using a new technology such as ITFS . . . [E]ducators are slow to accept new technologies and . . . many of the funding sources for education are even slower to make funds available for innovative endeavors such as ITFS." Of necessity, ITFS applicants have often requested extensions of time on construction permits for these and other fundamental reasons. ITFS applicants often do not have the funding available to build their own facilities, which is the reason the Commission permitted the leasing of excess capacity in the first place; therefore, they must rely on MMDS operators to pay for the construction and operation of their facilities. MMDS operators frequently delay ITFS facility construction until they can generate sufficient profit from their wireless operations and build their own facilities. In these circumstances, the determination by the Commission in its PSA decision to alter its prior policy and be more strict in granting ITFS extensions of time will only harm ITFS applicants and the educational benefits they can provide, without any compensating public interest benefits.

If ITFS extensions of time are not granted, MMDS operators will not get sufficient time to generate the profits they need to recoup the costs of building ITFS facilities, and they will have much less incentive to invest in ITFS channels. ITFS licensees should not be penalized for delays which are the inadvertent by-product of reasonable business determinations by their wireless cable partners. For all of these reasons, the Commission should upon reconsideration eliminate ITFS extension requests from its newly-announced stricter enforcement policies.

WHEREFORE, the Joint Parties respectfully urge the Commission upon reconsideration to modify its above-referenced decisions to delete the right of first refusal for BTA holders and to eliminate ITFS stations from the applicability of its stricter policy of enforcement regarding extension requests.

Respectfully submitted,

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August 15, 1995

JOINT PARTIES

Arizona State University

Four ITFS stations in the State of Arizona

Board of Trustees of Community Technical Colleges

Three ITFS stations in the State of Connecticut

Boston Catholic Television Center

Seven ITFS stations in the Commonwealth of Massachusetts

California State University-Fullerton

ITFS Stations WHR854, Modjeska Peak, CA

Catholic Diocese of Youngstown

Five ITFS stations in the State of Ohio

Connecticut Public Broadcasting, Inc.

Fourteen ITFS stations in the State of Connecticut

Daytona Beach Community College

Five ITFS stations in the State of Florida

Detroit Educational Television Foundation

ITFS Station WHR915, Detroit, Michigan

Fifteen Telecommunications, Inc.

ITFS Station WHR769, Louisville, Kentucky

Mid-South Public Communications Foundation

ITFS Station WHR533, Memphis, Tennessee

Mississippi Authority for Educational Television

Eleven ITFS stations in the State of Mississippi

Mississippi EdNet Institute, Inc.

An ITFS consortium in the State of Mississippi with a total of fifty-five ITFS stations authorized to its respective constituent members

Monterey County Office of Education

ITFS Station WNC366, Salinas, California

New Jersey Public Broadcasting Authority

Four ITFS stations in the State of New Jersey

North Carolina Agricultural and Technical State University

ITFS Station WHR683, Greensboro, North Carolina

North Carolina State University

ITFS Station WHR619, Raleigh, North Carolina

Northern California Educational Television Association

Public television Station KIXE and prospective ITFS applicant, Redding, California

Oregon Public Broadcasting

ITFS Station WHR543, Portland, Oregon

San Jose State University

Three ITFS stations in the State of California

Santa Clara County Office of Education

Two ITFS stations in the State of California

University of North Carolina at Charlotte

ITFS Station WHR657, Charlotte, North Carolina

University of North Carolina Center for Public Television

ITFS Station WLX436, Durham, North Carolina

University of North Carolina General Administration

Five ITFS stations in the State of North Carolina

WHYY, Inc.

ITFS Stations WLX823, Philadelphia, Pennsylvania, and WLX571, Wilmington, Delaware

Winston-Salem State University

ITFS Station WHR818, Winston-Salem, North Carolina

WJCT, Inc.

ITFS Station WNC678, Jacksonville, Florida